FEDERAL ELECTION COMMISSION 1 FIRST GENERAL COUNSEL'S REPORT 2 MUR: 7154 3 4 DATE COMPLAINT FILED: Oct. 18, 2016 DATE OF NOTIFICATION: Oct. 20, 2016 5 LAST RESPONSE RECEIVED: Jan. 10, 2018 7 **DATE ACTIVATED:** May 11, 2017 8 9 EXPIRATION OF SOL: Oct. 10, 2021 **ELECTION CYCLE: 2016** 10 11 12 **COMPLAINANT:** Kathleen M. Eagan **RESPONDENTS¹:** Ohio Democratic Party and Fran Alberty 13 in her official capacity as treasurer 14 Albertson for Congress and Esther Boykin 15 in her official capacity as treasurer 16 Strickland for Senate and Michael J. Johrendt 17 18 in his official capacity as treasurer Beatty for Congress and Jeffrey A. Ruppert 19 in his official capacity as treasurer 20 Hillary for America and Elizabeth Jones 21 in her official capacity as treasurer 22 23 Wharton for Congress and George Wharton in his official capacity as treasurer 24 25 **RELEVANT STATUTES** 26 AND REGULATIONS: 52 U.S.C. § 30101(20) 27 52 U.S.C. § 30116(a)(2) 28 52 U.S.C. § 30116(f) 29 52 U.S.C. § 30120(a) 30 11 C.F.R. § 100.24 31 11 C.F.R. § 100.140 32 11 C.F.R. § 109.21(g)(1) 33 11 C.F.R. § 109.37 34 11 C.F.R. § 110.11 35

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We are identifying the current treasurers in their official capacities as respondents. See Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3 (January 3, 2005). While Fran Alberty is Ohio Democratic Party's current treasurer, Zach West was its treasurer at the time of the events. See Ohio Democratic Party Amended Statement of Organization (Nov. 17, 2018). Similarly, while Elizabeth Jones is the current treasurer of Hillary for America, Jose Villareal was its treasurer at the time of the events. See Hillary for America Amended Statement of Organization (May 29, 2018).

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1 INTERNAL REPORTS CHECKED: Federal Disclosure Reports

2 FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

This matter involves a brochure and sample ballots produced and distributed by the

- 5 Ohio Democratic Party ("ODP"). In October 2016, ODP mass mailed a two-page brochure
- 6 featuring the photographs and names of five federal candidates endorsing numerous state and
- 7 local candidates in the November election. In addition, ODP displayed on its website, for
- 8 download and further distribution by viewers, three sample ballots listing various slates of
- 9 Democratic federal, state, and local candidates on the November 8, 2016 ballot.

The Complaint alleges that ODP, which is registered with the Commission as a state party committee,² was required by the Federal Election Campaign Act of 1971, as amended (the "Act"), to include the appropriate disclaimers on the brochure and sample ballots.³ In addition, the Complaint alleges that the brochure is a coordinated communication between ODP and each of the five federal candidates named therein, and that some portion of the costs associated with the mailing should be attributed as an in-kind contribution to each of those candidates.⁴ ODP claims that it was in compliance with disclaimer requirements and all the respondents deny that the brochure was coordinated.⁵

See Ohio Democratic Party Amended Statement of Organization (Nov. 17, 2018).

³ Compl. (Oct. 18, 2016).

⁴ *Id*.

ODP Resp. at 2-4 (Dec. 12, 2016); Albertson for Congress Resp. at 1-2 (Nov. 9, 2016); Strickland for Senate Resp. at 2-3 (Dec. 12, 2016); Hillary for America Resp. at 2-3 (Dec. 14, 2016); Beatty for Congress Resp. at 2 (Dec. 13, 2016); Wharton for Congress Resp. at 1 (Jan. 10, 2018). On December 28, 2016, Wharton for Congress filed a termination report. See FEC Form 3, Wharton for Congress, (Dec. 28, 2016). On January 5, 2017, the Reports Analysis Division accepted the termination. See Letter from Chris Jones, Campaign Finance Analyst, FEC, to George R. Wharton, Treasurer, Wharton for Congress (Jan. 5, 2017).

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As discussed below, we conclude that the brochure and sample ballots did not violate
the disclaimer provisions of the Act, and that the Respondents did not make coordinated
communications. Accordingly, we recommend that the Commission find no reason to believe
that ODP violated 52 U.S.C. § 30120 with respect to the brochure and sample ballots, find no

5 find no reason to believe ODP violated 52 U.S.C. § 30116(a)(2)(A) or that the candidate

6 committee Respondents violated 52 U.S.C.§ 30116(f) with respect to alleged coordination, and

7 close the file.

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II. FACTUAL AND LEGAL ANALYSIS

A. The Brochure Did Not Require a Federally Compliant Disclaimer

The two-page ODP brochure, which the Complainant alleges she received in the mail, 10 includes the names and photographs of five federal candidates on the general election ballot in 11 November 2016 — Hillary Clinton, Ted Strickland, Joyce Beatty, Ed Albertson, and Scott 12 Wharton — above the words "Join us in endorsing your state and local Democratic candidates."6 13 Below those words are the names of and offices sought by 31 state and local candidates on the 14 November ballot. The bottom of the first page contains the names and photographs of candidates 15 for prosecuting attorney and recorder, with the words: "Standing up for Franklin County." The 16 second page of the brochure contains the names and photographs of two candidates for the Ohio 17 Supreme Court. One of the accompanying captions states "Ohio Democrats are Stronger 18 Together. Ohio needs experienced and fair judges." Another is "Don't Think Twice Vote 19 O'Donnell and Rice for Ohio Supreme Court." The brochure also exhorts the reader to vote for 20

See Attachment 1; Compl. Ex. A. The brochure does not identify the offices sought by the federal candidates, which are, respectively, President, U.S. Senate in Ohio, and U.S. House in Ohio's 3rd, 12th and 15th Congressional Districts.

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- specific local "Issues," apparently ballot measures, and contains the words "Vote early or on
- 2 ELECTION DAY NOV. 8. OhioTogether.com." The second page also urges readers to: "Vote
- a early or on Election Day Nov. 8." The brochure does not contain a federally compliant
- 4 disclaimer, although the return address of the brochure contains ODP's name and street address,
- and the bulk postage stamp indicates that ODP paid the postage.⁷
- The Complaint asserts that the brochure required a disclaimer because it is a "public
- 7 communication" distributed by a political committee. 8 ODP contends that the brochure was
- 8 exempt from federal disclaimer laws because it did not constitute "Federal election activity" under
- 9 the Act.9
- The Act and Commission regulations require disclaimers on all "public communications,"
- including mass mailings, by any person that expressly advocates the election or defeat of a federal
- candidate or that solicits any contribution; all "electioneering communications" by any person;
- and all "public communications" by a "political committee." A disclaimer on a printed
- 14 communication, such as a mailer, must be in a box and state whether the communication is

The brochure also states: "Disclaimer: ODP will never charge you for text alerts, but your carrier's msg and data rates may apply." *Id*.

⁸ Compl. at 2-3.

ODP Resp. at 1-3. The candidate committees, Strickland for Senate, Hillary for America, Albertson for Congress, Beatty for Congress, and Wharton for Congress, each deny paying for the brochure or authorizing it; on that basis, they each assert that they are not responsible for any potential disclaimer violations. Strickland for Senate Resp. at 1-2; Hillary for America Resp. at 1-2; Beatty for Congress Resp. at 2-4; Albertson for Congress Resp. at 1-2; Wharton for Congress Resp. at 1.

⁵² U.S.C. § 30120(a); 11 C.F.R. § 110.11(a). The term "public communication" includes mass mailings, which in turn are defined as mailings "by United States mail . . . of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period." 52 U.S.C. § 30101(22), (23); 11 C.F.R. §§ 100.26, 100.27.

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- authorized by a candidate, candidate's committee, or its agents, and identify the person who paid
- 2 for the communication. 11 ODP's brochure did not contain such a disclaimer.
- ODP's brochure qualifies as a "public communication" because it is a "mass mailing," a
- 4 fact not disputed by ODP. 12 Thus, the brochure would require a disclaimer if ODP is a "political
- 5 committee" within the meaning of the disclaimer provision. 13 The Commission has determined,
- 6 however, that "the disclaimer provisions of the Act do not apply to purely non-Federal activity
- 7 conducted by a state or local political party committee's non-Federal component and paid for with
- 8 non-Federal funds" because such activity by a party committee is not activity of a "political
- 9 committee" within the scope of the disclaimer provision. 14 A state party committee
- 10 communication that is "wholly in connection with a non-federal election" is nevertheless subject
- to the disclaimer rules if it constitutes "federal election activity" ("FEA") or "other Federal-related

⁵² U.S.C. § 30120(a)(3); 11 C.F.R. § 110.11(b)(3). A disclaimer on a printed communication must be contained in a printed box, be of sufficient type size to be readable, and be printed with a reasonable degree of color contrast between the background and the disclaimer statement. 52 U.S.C. § 30120(c)(1), (2), (3); 11 C.F.R. § 110.11(c)(2)(i), (ii), (iii).

See ODP Resp. at 2-5. The brochure, as printed material, is not within the definition of "electioneering communication" and, therefore, not within the electioneering communication disclaimer provision. See 52 U.S.C. § 30104(f)(3) and 11 C.F.R. § 100.29 (defining "electioneering communication" as broadcast, cable, or satellite communication meeting certain specified requirements).

The brochure would also require a disclaimer if it solicits any contribution, though the brochure cannot be fairly read as soliciting any contribution. See 11 C.F.R. § 110.11(a)(3).

Statement of Reasons, Comm'rs. Toner, Lenhard, Mason, Walther, Weintraub & von Spakovsky at 5, MUR 5600 (Michigan Democratic State Central Committee) (agreeing with the OGC's coordination and federal election activity analyses, but disagreeing with the recommendation to find disclaimer violation for state party committee's non-federal component's non-federal disbursements for mass mailing in which federal candidate endorsed state candidate) ("MUR 5600 SOR"); see also 11 C.F.R. § 102.5(a)(i), (ii) (requiring state party committees that finance political activity in connection with both federal and non-federal elections, and that qualify as political committees, to establish either a dedicated federal account that is treated as a "separate Federal political committee," which must comply with the requirements of the Act, or establish a political committee that receives only contributions subject to the prohibitions and limitations of the Act, for use in both federal and non-federal elections).

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- activity requiring Federal funding."¹⁵ ODP asserts that the brochure was "properly paid for solely
- with non-federal funds," 16 which appears to be corroborated by ODP's state and federal disclosure
- 1. The Brochure is Not Federal Election Activity because it does Not Promote,
 Support, Attack, or Oppose a Federal Candidate

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One way ODP's communication would be considered FEA, and thus require a disclaimer as a public communication of a political committee, is if it refers to a clearly identified candidate for federal office and promotes, supports, attacks, or opposes a candidate for that office ("PASO").¹⁷ The Commission has stated that a public communication clearly identifying a federal candidate who is endorsing a state or local candidate does not necessarily PASO the endorsing federal candidate. In Advisory Opinion 2003-25 (Weinzapfel), the Commission concluded that a television advertisement, in which an incumbent candidate for U.S. Senate, who was identified as Senator in written words on screen, appeared and spoke his endorsement of a local candidate, did not PASO that federal candidate. The Commission stated, "[u]nder the plain language of [the Act], the mere identification of an individual who is a Federal candidate does not automatically promote, support, attack, or oppose that candidate." Similarly, in the enforcement

MUR 5600 SOR at 3-4; see also 52 U.S.C. § 30101(20) (defining FEA); 11 C.F.R. § 100.24 (same); cf. 11 C.F.R. § 300.32 (describing that activity for which state party committee must use federal funds and that non-federal activity for which state party committee may use federal or non-federal funds).

ODP Resp. at 2.

¹⁷ See 52 U.S.C. § 30101(20)(A)(iii); 11 C.F.R. § 100.24(b)(3).

Advisory Op. 2003-25 at 3-5. In subsequent advisory opinions, the Commission concluded that public communications did not PASO a federal candidate when the communication does not add any additional statement that could be construed as support or promotion of the federal candidate, and the communication emphasizes state or local candidates. See, e.g., Advisory Op. 2009-26 (Coulson) (concluding, in respect to the identification of a candidate by name and picture on a mass mailing, that "the mere identification of an individual who is a Federal candidate does not, in itself, promote, support, attack, or oppose that candidate"); Advisory Op. 2007-21 (Holt) (considering federal candidate's name and title "Honorary Chairman" contained on state campaign's letterhead and

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- context, in MUR 5600 (Michigan Democratic State Central Committee), the Commission
- 2 approved OGC's recommendations that a state party mailer was not required to be paid with
- federal funds because it did not PASO a federal candidate merely by containing a quotation from
 - 4 U.S. Rep. Dingell, who at the time was a Democratic candidate for re-election in the 15th
 - 5 Congressional District in Michigan, endorsing a state candidate and a photo of Dingell and the
 - 6 state candidate together. 19

We conclude that the five federal candidates were included in the ODP brochure in connection with an endorsement and the brochure did not PASO any federal candidate. The five federal candidates are identified in the brochure by photograph and name, but the brochure includes no information about these candidates other than their identification. It does not mention their federal offices sought and neither praises nor criticizes the federal candidates; indeed, the brochure says nothing about the federal candidates at all, other than the presentation of their names and images. Their photographs are of approximately equal size to the photographs of the state candidates contained on the same page, and are smaller than the two photographs of the state judicial candidates on the second page of the brochure. The names of 31 other state and local candidates and offices sought appear along with exhortations to vote on local issues, and, while the qualifications of the photographed state candidates are listed, the brochure makes no representations about the qualifications of the federal candidates. The general exhortation to vote,

other public communications). In one opinion, the Commission reached this decision in the context of a communication that included an exhortation to vote. Advisory Op. 2007-34 (Jackson, Jr.) at 2 (advertisement contained the words "Vote February 5th," the date of the primary election of both the endorsing federal candidate and the state candidate in question).

See MUR 5600 First Gen. Counsel's Rpt. at 3-5; Certification, MUR 5600 (Apr. 18, 2006); MUR 5600 SOR at 1-2; see also MURs 5387/5446 (Welch for Wisconsin) (radio advertisement that contained endorsement by federal candidate without mentioning federal candidacy did not PASO the federal candidate).

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- "Vote early or on Election Day Nov. 8," appears below the list of 31 state and local candidates, 1
- not directly below the photographs and names of the federal candidates. Taken as a whole, the 2
- brochure does not contain any statements that could be construed as support or promotion of any 3
- of the referenced federal candidates. Just as the advertisements discussed above featuring a 4
- federal candidate's endorsement of a local candidate did not PASO the federal candidate, the ODP 5
- brochure, featuring the photographs and names of the federal candidates with the statement "Join 6
- us in endorsing your state and local Democratic candidates," does not PASO the endorsing federal 7
- candidates. 8

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2. The Brochure is Not Federal Election Activity because it is Not GOTV

The brochure would also be considered FEA, and thus require a disclaimer as a public communication of a political committee, if it constitutes get-out-the-vote activity ("GOTV").²⁰ GOTV generally includes any activity that encourages or urges potential voters to vote, including informing voters of polling locations or hours and providing transportation to the polls.²¹ The Commission regulations state that "[a]ctivity is not get-out-the-vote activity solely because it includes a brief exhortation to vote, so long as the exhortation is incidental to a communication, activity, or event."²² Examples of communications that are not GOTV include: (1) "[a] mailer praises the public service record of mayoral candidate X and/or discusses his campaign platform. The mailer concludes by reminding recipients, 'Vote for X on November 4th,'" and (2) "[a] phone

²⁰ See 52 U.S.C. § 30101(20)(A)(ii); 11 C.F.R. § 100.24(b)(2)(iii).

²¹ 11 C.F.R. § 100.24(a)(3)(i).

¹¹ C.F.R. § 100.24(a)(3)(ii); see also Definition of Federal Election Activity, 75 Fed. Reg. 55,257, 55,263-65 (Sept. 10, 2010) ("FEA E&J").

- call for a State party fundraiser [that] gives listeners information about the event, solicits
- donations, and concludes by reminding listeners, 'Don't forget to vote on November 4th.'"²³
- We conclude that the brochure is not GOTV because it contains only a brief exhortation to
- 4 vote, and the exhortation is incidental to the communication.²⁴ The statements in ODP's brochure
- 5 are similar to the statements the Commission regulations specify are not GOTV. For instance, on
- 6 the first page of the brochure: "Vote early or on ELECTION DAY NOV. 8" is materially similar
- 7 to the regulatory example cited above which reminds the reader to vote on a specific day.²⁵ The
- statement on the second page of the brochure: "Don't Think Twice Vote O'Donnell and Rice for
- 9 Ohio Supreme Court" is materially similar to the other example urging the reader to vote for a
- specific candidate.²⁶ Moreover, the majority of the space in the brochure is dedicated to
- promoting state and local candidates, and discussing their qualifications, platforms, and local
- issues, and the statements urging the readers to vote constitute a single phrase on each page and
- occupy minimal space, thus supporting the conclusion that they are incidental.²⁷.

²³ 11 C.F.R. § 100.24(a)(3)(ii)(A)-(B).

²⁴ See FEA E&J at 55,263-65; 11 C.F.R. § 100.24(a)(3)(ii).

²⁵ See 11 C.F.R. § 100.24(a)(3)(ii)(B).

²⁶ See 11 C.F.R. § 100.24(a)(3)(ii)(A).

²⁷ See FEA E&J at 55,264-65; see also 11 C.F.R. § 100.24(a)(3)(ii)(A), (B).

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3. The Brochure Does Not Appear to Otherwise Constitute Federal-Related Activity Requiring Federal Funding so as to Require a Disclaimer

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The ODP brochure neither PASOs a federal candidate nor is GOTV and does not

- 5 otherwise constitute FEA.²⁸ The brochure also does not appear to fall within the express
- 6 advocacy scope provision of the disclaimer rules.²⁹
 - Moreover, ODP's brochure does not appear to be a slate card subject to the disclaimer
- 8 rules at 110.11(e)³⁰ or any other provision in the scope of the disclaimer rules other than for

FEA also includes voter registration activity 120 days before a federal election; voter identification; generic campaign activity in connection with an election in which a candidate for federal office appears; and services provided during any month an employee of a state party committee spends more than 25 percent of that individual's time in connection with a federal election. 52 U.S.C. § 30101(20)(A)(i), (ii), (iv); 11 C.F.R. § 100.24(b)(1), (2)(i) and (ii), (4). ODP asserts that the brochure constitutes none of these aspects of FEA, and we agree: ODP's brochure is not voter registration activity because it does not "assist, encourage, or urge potential voters to register to vote;" does not constitute generic campaign activity because it promotes candidates for non-federal office; does not meet the definition of voter identification because it does not seek to acquire information about potential voters or obtain voter lists; and is a communication, not a service provided by a state party employee. See ODP Resp. at 2-3; FEA E&J at 55,260; 52 U.S.C. § 30101(21); 11 C.F.R. §§ 100.24(b)(1), 100.24(b)(2)(i), 100.24(b)(4), 100.25.

See 11 C.F.R. § 110.11(a)(2); 11 C.F.R. § 100.22 (a communication "expressly advocates" the election or defeat of a clearly identified candidate when, among other things, it contains campaign slogans or individual words that "in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates" or when, taken as a whole and with limited reference to external events, it "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates"). We conclude that because the ODP brochure does not meet the PASO standard, see discussion supra Section II.A.1, it does not meet the more restrictive express advocacy standard. See 52 U.S.C. § 30101(20)(A)(iii) and 11 C.F.R. § 100.24(b)(3) (providing that a communication may PASO a candidate whether or not the communication expressly advocates the election or defeat of a federal candidate); see also Coordinated Communications, 74 Fed. Reg. 53,893, 53,900 (Oct. 21, 2009) (proposing, in response to court decision requiring more inclusive coordination content standard than express advocacy, PASO content standard, on basis that "express advocacy is a subset of PASO") (not promulgated in final rules).

Section 110.11(e) specifies that political party committees must comply with applicable disclaimer requirements for certain "exempt activity" communications, including slate cards, though need not include candidate authorization statements in those disclaimers. 11 C.F.R. § 110.11(e); see also 11 C.F.R. §§ 100.80, 100.140 (exempting from definitions of "contribution" and "expenditure," respectively, a slate card, sample ballot, or other printed listing of three or more candidates for public office for which an election is held in the state in which the political party committee is organized, though it may or may not be FEA); Prohibited and Excessive Contributions: Non-federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,068-069 (July 29, 2002). The Statement of Reasons in MUR 5600, which considered a communication listing less than three candidates, did not address whether a political party committee disbursing non-federal funds for a slate card or similar mailing would be required to include a disclaimer on such a public communication. Nonetheless, ODP's brochure does not appear to fall within the definition at 11 C.F.R. § 100.140. See Factual and Legal Analysis at 3, MUR 6088 (Haverford Township Democratic Committee) (materials subject to the slate card exemption may only include basic candidate voting information, and publications that go beyond the informational limitations and include language criticizing opponents, additional

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- public communications by a political committee. Finally, as explained further below, ODP's
- 2 brochure does not appear to be coordinated with any federal candidate so as to require federal
- funds for any resulting contribution. In sum, ODP's brochure appears to be purely non-federal
- activity by a state party committee and, appears to be paid for from ODP's non-federal account, 31
- 5 thus the communication appears to be exempt from the Act's disclaimer requirements, consistent
- 6 with the Commission's conclusions in MUR 5600. Accordingly, we recommend that the
- 7 Commission find no reason to believe that the Ohio Democratic Party violated 52 U.S.C. § 30120
- 8 with respect to using the appropriate disclaimers on the brochure.

B. The Sample Ballots Contained the Required Disclaimer

- The three sample ballots attached to the Complaint, each one-sided, include the heading:
- "Ohio Democrats are Stronger Together" and "Ohio Democratic Party Official Sample Ballot."³²
- 12 The first sample ballot contains photographs of Hillary Clinton, U.S. Representative Marcy
- 13 Kaptur, and Barack Obama; the second, photographs of Clinton and Tim Kaine; and the third, a
- photograph of U.S. Representative Joyce Beatty.³³ The ballots list the names of and offices

biographical information, descriptions of candidates' positions on issues, or party philosophy do not qualify for the exemption). ODP's brochure criticizes local judicial candidates' opponents; and includes state and local candidate biographical information. Compl. Ex.A.

ODP's reports filed with the Ohio Secretary of State disclose disbursements for "mailing" during the time the brochure was distributed, October 2016, and its reports filed with the Commission do not disclose any such payments during that time. See ODP 2016 Post General Rpt (Dec. 16, 2016)

https://www6.sos.state.oh.us/ords/f?p=CFDISCLOSURE:39:::NO:RP:P39 ENTITY ID.P39 LISTTYPE:5001.simple; see also Third Amended Post-General 2016 Rpt. (Sept. 25, 2017), Amended Pre-General Rpt. (June 6, 2017).

https://www.fec.gov/data/committee/C00016899/?cycle=2016&tab=filings. The Committee's reporting at both the state and federal level is consistent with its assertion that the brochure was paid for "exclusively with non-federal funds." See OPD Resp. at 3.

See Attachment 2. Compl. Exs. B, C, D.

³³ *Id*.

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- sought by federal, state, and local candidates.³⁴ The Complaint asserts that the sample ballots are
- 2 publicly available on ODP's website, which contains a disclaimer; the Complaint alleges,
- 3 however, that "viewers are encouraged to download the sample ballot, post it on Facebook or
- 4 tweet it" and when so printed, posted to Facebook, or tweeted, the sample ballots contain no
- 5 disclaimer. 35 The Complaint further asserts that sample ballots were "issued" by ODP. While the
- 6 Complaint asserts that it attached "true and accurate copies of the several sample ballots," it does
- 7 not clearly set forth how they were obtained, e.g., whether they were printed from ODP's website,
- 8 or if ODP "issued" them in printed form.³⁶
- 9 ODP asserts that, as internet communications, the sample ballots appearing on its website
- did not require disclaimers, and that its website contained the appropriate disclaimer.³⁷ ODP
- 11 further claims that it "only encouraged individuals to use these documents for their personal use,
- or to place them on their personal social networking websites (specifically, Facebook or
- 13 Twitter)."38 ODP further asserts that it created and distributed separate versions of each sample
- ballot, each containing the appropriate disclaimer.³⁹

³⁴ *Id*.

Compl. at 2.

³⁶ *Id*.

ODP Resp. at 1, 6, Attach. 5.

³⁸ *Id.* at 6.

Id. at 6, Attach. 2, 3, 4. ODP attaches to its response copies of two-sided printed sample ballots, with the second side of the ballot including a disclaimer in a printed box stating: "Paid for by the Ohio Democratic Party," or "Paid for by the Ohio Democratic Party, David Pepper, Chairman." Id. at 6, Attach. 2, 3, 4.

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disclaimer requirements, but need not state whether the communication is authorized by a

candidate or authorized committee.⁴⁰ The Commission's regulations provide that a required

disclaimer need not appear on the front or cover page of the communication as long as it appears

Sample ballots authorized by a political party committee must comply with the Act's

within the communication."41 All websites of political committees available to the general public

must include a disclaimer.⁴²

The one-sided sample ballots attached to the Complainant contained no disclaimer; the two-sided copies of the sample ballots provided by ODP, which it asserts were printed and distributed, contain a disclaimer, on the second side, stating that they were paid for by ODP. 43 Therefore, to the extent that the Complaint is premised on sample ballots printed and distributed by ODP, it appears that the printed and distributed sample ballots contained the appropriate disclaimer. Further, to the extent that the Complaint is premised on sample ballots ODP posted on its own website, images on websites do not have separate disclaimer requirements, and the ODP website, generally, contained the appropriate disclaimer. 44 Accordingly, we recommend

^{40 11} C.F.R. §§ 110.11(e), 100.140.

¹¹ C.F.R. § 110.11(c)(2)(iv) (also noting exception for communications such as billboards, that contain only a front face, which is not applicable here).

⁴² 11 C.F.R. § 110.11(a)(1); see also Advisory Op. 1995-09 (NewtWatch) at 2.

See Attachment 3. ODP Resp. Attach. 2, 3, 4.

ODP Resp. Attach. 5. As for third parties' use of ODP's sample ballots on the internet, the available record does not indicate that ODP placed the ballots on another person's website for a fee and, therefore, such ballots are not "public communications" by ODP within the scope of the disclaimer requirement. See 11 C.F.R. §§ 100.26 (defining "public communication"), 110.11(a)(1); see also Advisory Op. 2011-14 (Utah Bankers Association) (concluding that further disclaimers to email solicitations and website are not necessary, even if asked to be forwarded). Further, the Commission has concluded that internet pages do not constitute "printed communications;" therefore, the additional disclaimer requirements for printed disclaimers, including the "printed box" requirement, do not apply to campaign websites. See Statement of Reasons, Comm'rs. Weintraub, Walther, Lenhard, Mason, Toner and von Spakovsky at 4, MUR 5526 (Graf for Congress); see also Factual and Legal Analysis at 2-3, MUR 6591 (Friends of Tom Stilson); Factual and Legal Analysis at 6-9, MUR 5887 (Republican Main Street Partnership).

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- that the Commission find no reason to believe that the Ohio Democratic Party violated 52 U.S.C.
- § 30120 with respect to using the appropriate disclaimers the sample ballots.

C. The Brochure is not a Coordinated Communication

- The Complaint alleges that the brochure purports to be a communication from the five named federal candidates and paid for by ODP, and thus appears to be a coordinated communication between ODP and each federal candidate; as such, the Complaint alleges that a portion of the costs associated with the brochure appears to be an in-kind contribution from ODP to each federal candidate. Respondents deny coordinating the brochure, and the responding federal candidate committees each deny that they authorized the brochure and assert that the safe harbor provision for endorsing federal candidates applies. 46
 - Contributions from a state party committee to a candidate committee are limited to a total of \$5,000 per election, and candidates and political committees are prohibited from knowingly accepting contributions in excess of the Act's limits; party committees may make "party coordinated communications" subject to a higher limit.⁴⁷ Under the Act, expenditures that are

⁴⁵ Compl. at 3.

ODP Resp. at 4; Strickland for Senate Resp. at 1-3; Hillary for America Resp. at 1-3; Beatty for Congress Resp. at 2-4; Albertson for Congress Resp. at 1-2; Wharton for Congress Resp. at 1. One candidate committee, Albertson for Congress, acknowledges it provided Albertson's photograph to ODP and that it was used in the brochure. Albertson for Congress Resp., Edward G. Albertson Aff. ¶ 4, 7 (Nov. 5, 2016); Esther Boykin, Treasurer Aff. ¶ 7 (Nov. 4, 2016); Albertson for Congress Resp. Ex. A. This use could raise an issue of ODP's republication of Albertson's campaign material, thus constituting a contribution to Albertson. See 11 C.F.R. § 109.23. But the Albertson photograph is one small photograph in a brochure of many photographs and the brochure primarily focuses on state and local candidates and issues. Thus, the republished photograph appears to be of de minimis value. See Factual and Legal Analysis at 7-8, MUR 6840 (All Citizens for Mississippi) (dismissing a republication allegation due to its de minimis value).

⁵² U.S.C. § 30116(a)(2)(A), (f). The Act grants state party committees authority to also support their general election candidates with coordinated expenditures subject to certain limits, including through assignment by a national party committee. See 52 U.S.C. § 30116(d); 11 C.F.R. § 109.32. In 2016, the coordinated limit to support House candidates in states with more than one congressional district was \$48,100; the coordinated limit to support Ohio Senate candidates was \$863,800; and the limit for presidential candidates was \$23,821,100. See https://www.fec.gov/resources/cms-content/documents/fedreg_notice_2016-01.pdf.

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coordinated with a candidate are treated as contributions to the candidate.⁴⁸ The Commission has

2 promulgated certain exceptions to the definitions of "party coordinated communication" and

3 "coordinated communication," including that a public communication in which a federal

4 candidate endorses another candidate for federal or non-federal office is not a coordinated

communication as to the endorsing federal candidate unless the communication PASOs the

endorsing candidate or another candidate who seeks election to the same office as the endorsing

candidate.⁴⁹ In creating a safe harbor for endorsements, the Commission stated that the

8 coordinated communications regulation identifies communications made for the purpose of

influencing a federal election, whereas endorsements "are not made for the purpose of influencing

the endorsing . . . candidate's own election."50 It also concluded that when the safe harbor

applies, the endorsing candidate may be involved in the development, content, timing, frequency,

means or mode of the communication.⁵¹

The endorsement safe harbor appears to apply here because, as discussed above, the ODP brochure does not appear to PASO any of the five federal candidates pictured and named in the brochure or any other candidate running for the offices each sought.⁵² Therefore, the brochure appears to be exempt from the definition of "coordinated communication." Accordingly, we recommend that the Commission find no reason to believe that the Ohio Democratic Party

⁴⁸ 52 U.S.C. § 30116(a)(7)(B).

⁴⁹ 11 C.F.R. §§ 109.37(a)(3), 109.21(g)(1).

⁵⁰ Coordinated Communications. 71 Fed. Reg. 33,190, 33,202 (June 8, 2006).

⁵¹ *Id*.

See 11 C.F.R. §§ 109.37(a)(3), 109.21(g); discussion at Section II.A.1. supra; Factual & Legal Analysis at 4-9, MUR 7022 (Bernie 2016) (finding no reason to believe the federal candidate committee violated the disclaimer provisions by failing to include the approval/authorization or "paid for by"

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MUR 7154 (Ohio Democratic Party, et al.) First General Counsel's Report Page 16 of 17

- violated 52 U.S.C. § 30116(a)(2) by making a coordinated expenditure for the brochure, or that
- 2 Albertson for Congress, Strickland for Senate, Beatty for Congress, Hillary for America, or
- Wharton for Congress violated 52 U.S.C. § 30116(f) by accepting an excessive contribution.

4 III. RECOMMENDATIONS

Find no reason to believe that Ohio Democratic Party and Fran Alberty in her official capacity as treasurer violated 52 U.S.C. § 30120 with respect to using the appropriate disclaimers on the brochure and sample ballots.

Find no reason to believe that the Ohio Democratic Party and Fran Alberty in her official capacity as treasurer violated 52 U.S.C. § 30116(a)(2)(A) by making a coordinated expenditure for the brochure.

3. Find no reason to believe that Albertson for Congress and Esther Boykin in her official capacity as treasurer, Strickland for Senate and Michael J. Johrendt in his official capacity as treasurer, Beatty for Congress and Jeffrey A. Ruppert in his official capacity as treasurer, Hillary for America and Elizabeth Jones in her official capacity as treasurer, or Wharton for Congress and George Wharton in his official capacity as treasurer violated 52 U.S.C. § 30116(f) by accepting an excessive contribution.

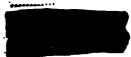
4. Approve the attached Factual and Legal Analysis.

22 5. Approve the appropriate letters.

MUR 7154 (Ohio Democratic Party, et al.) First General Counsel's Report Page 17 of 17

1	6. Close the file.	
2		Lisa J. Stevenson
3	·	Acting General Counsel
4		_
5		Charles Kitcher
6		Acting Associate General Counsel for Enforcement
7		_
8		0. 0.01
9	July 16, 2019	Peter G. Blumberg Peter G. Blumberg
10	Date	Peter G. Blumberg
11		Acting Deputy Associate General Counsel
12		for Enforcement
13		
14		7.4 / 4.40
15		Mark Allen
16	•	Mark Allen
17		Assistant General Counsel
18		•
19		Christine C. Hallagher
20		<u> </u>
21		Christine C. Gallagher
22		Attorney
23		
24	Attachments:	
25	1. Brochure	
26	2. Sample Ballots submitted by Complaine	
27	3. Sample Ballots submitted by Ohio Dem	ocratic Party
28	4. Factual and Legal Analysis	

340 EAST FULTON STREET | COLUMBUS, OH 43215 ODP16103_FRANKLIN PRESORTED
FIRST CLASS MAIL
U. S. POSTAGE
PAID
OHIO DEMOCRATIC
PARTY









Ted Strickland



Joyce Beatty



Ed Albertson



Scott Wharton

Join us in endorsing your state and local Democratic candidates.

	Cathy Johnson ate Senate District 16	Bernadine Kennedy Kent State House District 25	Antoinette C. Miranda State School Board 6 th District	Laurel A. Beatty Common Pleas Court	
St	Adam Miller ate House District 17	Hearcel F. Craig State House District 26	Stephanie Dodd State School Board 9th District	Richard A. Frye Common Pleas Court	
St	Kristin Boggs ate House District 18	Kevin Boyce Commissioner	Judge John P. O'Donnell Supreme Court Justice	Kimberly Cocroft Common Pleas Court	
	lichael Johnston ate House District 19	John O'Grady Commissioner	Judge Cynthia Rice Supreme Court Justice	Jim Reese Common Pleas Court	
	Heather Bishoff ate House District 20	Zach Klein Prosecuting Attorney	Jennifer Brunner 10 th District Court of Appeals	Vote for Issues 1, 2, 3, & 4 City of Columbus Bond Issues	
Sta	Ryan Koch ate House District 21	Maryellen O'Shaughnessy Clerk of Courts	Julia L. Dorrian 10 th District Court of Appeals		
Sta	David Leland ate House District 22	Dallas L. Baldwin Sheriff	Crysta Pennington Common Pleas Court	Vote for Issue 57 Columbus School	
Lee Schreiner State House District 23		Danny O'Connor Recorder	Mark A. Serrott Common Pleas Court	Improvement Plan	
	Kristopher Keller ate House District 24	Anahi Ortiz Coroner	Jeffrey M. Brown Common Pleas Court	Vote Yes on Issue 60 COTA Renewal	

Vote early or on **ELECTION DAY NOV. 8.** OhioTogether.com

Standing up for Franklin County



Zach Klein Prosecuting Attorney

- A prosecutor for the 21st century
- Keeping our families and neighborhoods safe



Danny O'Connor Recorder

- A reformer, committed to service with integrity
- A champion of veterans, homeowners, and small businesses

Attachment 1 Page 1 of 2 DEMOCRATS ARE STRONGER TOGETHER. Ohio needs experienced and fair judges.



John P. O'Donnell

- John P. O'Donnell has served as judge on the Cuyahoga County Common Pleas Court — one of the busiest courts in Ohio — since 2002
- Impressive legal background and history of standing up for working Ohioans
- "Recommended" by the Ohio State Bar Association
- Opponent endorsed by pro-big business groups that want to limit access to courts



Cynthia Rice -

- Cynthia Rice serves as presiding judge on the 11th District Court of Appeals, where she was first elected in 2002
- Over 10 years as a prosecutor handling violent crime and public corruption cases
- "Highly Recommended" by the Ohio State Bar Association
- Opponent is a career politician "Not Recommended" by the State Bar

Don't Think Twice Vote **O'Donnell** and **Rice**

FOR OHIO SUPREME COURT



1. Vote early or on Election Day Nov. 8.



2. Text **FIGHT** to **90975** to get involved.



3. Learn more at: OhioTogether.com

Ohio Democrats are STRONGER TOGET HER



Ohio Democratic Party Official Sample Ballot

Hillary Clinton and Tim Kaine United States President & Vice President

Ted Strickland United States Senate	John Tharp Sheriff
Marcy Kaptur	Phillip D. Copeland
United States Rep - 9th District	Recorder
James Neu, Jr. United States Rep - 5th District	Wade Kapszukiewicz Treasurer
Kirk Halliday	Keith Earley
State Senate District 2	Engineer
Michael Ashford State House District 44	James Patrick Coroner
Teresa Fedor	Judge John P. O'Donnell
State House District 45	Supreme Court Justice
Michael P. Sheehy	Judge Cynthia Rice
State House District 46	Supreme Court Justice
Lauri Cooper	Gary Cook
State House District 47	6th District Court of Appeals
Tina Skeldon Wozniak Commissioner	Mark L. Pietrykowski 6th District Court of Appeals
Pete Gerken	Dean Mandros
Commissioner	Common Pleas Court
Julia Bates Prosecuting Attorney	Lindsay Navarre Common Pleas Court
Bernie Quilter	. ตัดกัดเกิดตั้ . อำเภอ

Attachment 2 Page 1 of 3

Ohio Democrats are STRONGER TOGETMER





ODP1604 HAMILTON

Ohio Democratic Party Official Sample Ballot

Hillary Clinton and Tim Kaine United States President & Vice President

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Ted Strickland United States Senate	Jim Neil Sheriff	
Michele Young	Wayne Coates	
United States Rep - 1st District	Recorder	
Mary Rose Lierman	Seth T. Walsh	
State Senate District 8	Treasurer	
Joe Otis	Lakshmi Kode Sammarco	
State House District 27	Coroner	
Jessica Miranda	Judge John P. O'Donnell	
State House District 28	Supreme Court Justice	
Mark A. Childers	Judge Cynthia Rice	
State House District 30	Supreme Court Justice	
Brigid Kelly State House District 31	Marilyn Zayas-Davis 1st District Court of Appeals	
Catherine Ingram	Jody Marie Luebbers	
State House District 32	Common Pleas Court	
Alicia Reece	Darlene Rogers	
State House District 33	Common Pleas Court	
Todd Portune	Peter J. Stackpole	
Commissioner	Common Pleas Court	
Denise Driehaus	Alvertis Bishop	
Commissioner	Common Pleas Court	
Alan C. Triggs Prosecuting Attorney	Michael T. Mann Common Pleas Court	
Aftab Pureval Clerk.of Courts	Darrell D. Payne Juvenile Court	

Attachment 2 Page 2 of 3



Ohio Democratic Party Official Sample Ballot

Hillary Clinton and Tim Kaine United States President & Vice President

United States Presid	ient & vice President
Ted Strickland United States Senate	Zach Klein Prosecuting Attorney
Joyce Beatty	Dallas L. Baldwin
United States Rep — 3 rd District	Sheriff
Ed Albertson	Danny O'Connor
United States Rep — 12 th District	Recorder
Scott Wharton	Anahi Ortiz
United States Rep — 15th District	Coroner
Cathy Johnson	Antoinette C. Miranda
State Senate District 16	State School Board 6th District
Adam Miller	Stephanie Dodd
State House District 17	State School Board 9th District
Kristin Boggs	Judge John P. O'Donnell
State House District 18	Supreme Court Justice
Michael Johnston	Judge Cynthia Rice
State House District 19	Supreme Court Justice
Heather Bishoff State House District 20	Jennifer Brunner 10th District Court of Appeals
Ryan Koch State House District 21	Julia L. Dorrian 10th District Court of Appeals
David Leland State House District 22	Laurel A. Beatty Common Pleas Court
Lee Schreiner	Jeffrey M. Brown
State House District 23	Common Pleas Court
Kristopher Keller State House District 24	Kimberly Cocroft Common Pleas Court
Bernadine Kennedy Kent State House District 25	Richard A. Frye Common Pleas Court
Hearcel F. Craig	Crysta R. Pennington
State House District 26	Common Pleas Court
Kevin Boyce	Jim Reese
Commissioner	Common Pleas Court
John O'Grady	Mark A. Serrott
Commissioner	Common Pleas Court
Maryellen O'Shaughnessy	OHIO DEMOCRATIC PARTY

Clerk of Courts

Attachment 2 Side 1 of 2

Ohio Democrats are



Hillary Clinton and Tim Kaine United States President & Vice President

Ted Strickland John Tharp **United States Senate** Sheriff Marcy Kaptur United States Rep - 9th District Recorder James Neu, Jr. United States Rep - 5th District Treasurer Kirk Halliday **Keith Earley**

State Senate District 2 Engineer

Michael Ashford State House District 44

Teresa Fedor State House District 45

Michael P. Sheehy **State House District 46**

Lauri Cooper State House District 47

Tina Skeldon Wozniak Commissioner

Pete Gerken Commissioner

Julia Bates **Prosecuting: Attorney**

Bernie Quilter Clark of Courts

Phillip D. Copeland

Wade Kapszukiewicz

James Patrick Coroner

Judge John P. O'Donnell **Supreme Court Justice**

Judge Cynthia Rice Supreme Court Justice

Gary Cook 6th District Court of Appeals

Mark L. Pietrykowski 6th District Court of Appeals

Dean Mandros **Common Pleas** 'Court

Lindsay Navarre **Common Pleas Court**

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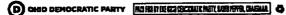


As Governor, TED STRICKLAND Put Ohio on the Road to Economic Recovery

- Ted helped rescue the auto industry and helped save 160,000 Ohio jobs
- · He balanced every budget, oversaw a tax cut for every Ohioan, protected funding for education and froze college tuition costs

Now TED STRICKLAND is Ready to Fight for Ohio Families in the US Senate

- Ted opposes raising the Medicare retirement age and he wants to expand Social Security benefits
- · He will create thousands of jobs by creating an infrastructure bank to rebuild our nation's roads and bridges — paid for by closing loopholes that allow large corporations to avoid paying their fair share of taxes







1. Vote early or on Election Day Nev. 8.



2. Text FIGHT to 90975 to get involved.



3. Learn more at: www.OhioTogether.com

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Page 2 of 6

Attachment 3
Side 1 of 2

Ohio Democrats are STRONGER TOGETHER



Hillary Clinton and Tim Kaine United States President & Vice President

	- The Tree Tree Tree Tree Tree Tree Tree
Ted Strickland United States Senate	Jim Neil Sheriff
Michele Young United States Rep - 1 st District	Wayne Coates Recorder
Mary Rose Lierman State Senate District 8	Seth T. Walsh Treasurer
Joe Otis State House District 27	Lakshmi Kode Sammarco Coroner
Jessica Miranda State House District 28	Judge John P. O'Donnell Supreme Court Justice
Mark A. Childers State House District 30	Judge Cynthia Rice Supreme Court Justice
Brigid Kelly State House District 31	Marilyn Zayas-Davis 1" District Court of Appeals
Catherine Ingram State House District 32	Jody Marie Luebbers Common Pleas Court
Alicia Reece State House District 33	Dariene Rogers Common Pleas Court
Todd Portune Commissioner	Peter J. Stackpole Common Pleas Court
Denise Driehaus Commissioner	Alvertis Bishop Common Pleas Court
Alan C. Triggs Prosecuting Attorney	Michael T. Mann Common Pleas Court
Aftab Pureval Clerk of Courts	Darrell D. Payne Juvenile Court

Attachment 3 Page 3 of 6





As Governor, TED STRICKLAND **Put Ohio on the Road to Economic Recovery**

- · Ted helped rescue the auto industry and helped save 160,000 Ohio jobs
- · He balanced every budget, oversaw a tax cut for every Ohioan, protected funding for education and froze college tuition costs

Now TED STRICKLAND is Ready to Fight for Ohio Families in the US Senate

- Ted opposes raising the Medicare retirement age and he wants to expand Social Security benefits
- · He will create thousands of jobs by creating an infrastructure bank to rebuild our nation's roads and bridges — paid for by closing loopholes that allow large corporations to avoid paying their fair share of taxes









2. Text **FIGHT** to **90975** to get involved.

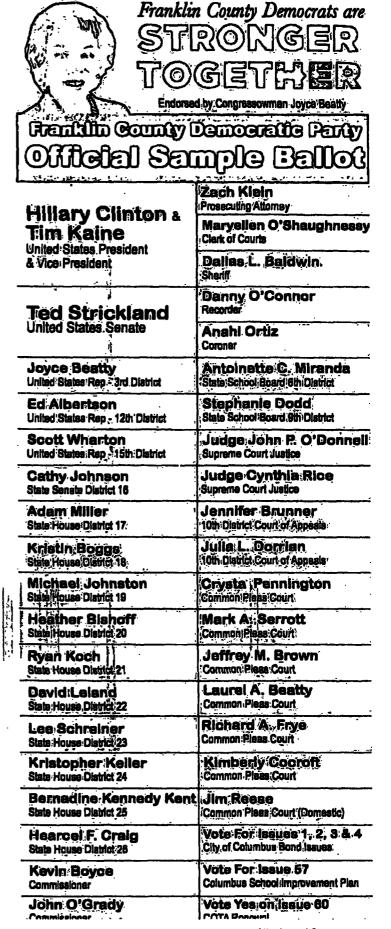


3. Learn more at: www.OhioTogether.com

(BISCLAURE): COP WILL BEYER CRASSE YOU FOR TOTA ALREIS, BUT YORK CASESES HERE & MALA MATES HAVE APPLIED

Attachment 3 Side 2 of 2

Attachment 3 Page 4 of 6 Attachment 4
Side 1 of 2



Attachment 3 Page 5 of 6

Franklin County Democratic Party Official Sample Ballot



"Every race is important this year. We need to make sure we elect leaders we can trust, like Zach Klein for County Prosecutor."

Andrew J. Gumer Columbies Mayor



"In this important Election be sure to vote for every Democrat and Issue on your ballot."

> -Michael B. Coleman Former Columbus Mayer

STRONGER TOGETHER

Thank you for voting early! Now let's make sure that we get other voters out to the polls and get Democrats up and down the ticket elected.

Sign up to volunteer before or on Election Day on our website: www.fcdp.org/volunteer

Paid for by the Ohlo Democratic Party



Attachment 3 Page 6 of 6

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1			FEDERAL ELECTION COMMISSION	
2			•	
3			FACTUAL AND LEGAL ANALYSIS	
4		_		
5	RES	PONDENTS ¹ :	Ohio Democratic Party and Fran Alberty	MUR 7154
6			in her official capacity as treasurer	
7			Albertson for Congress and Esther Boykin	
8			in her official capacity as treasurer	
9			Strickland for Senate and Michael J. Johrendt	
10			in his official capacity as treasurer	
11			Beatty for Congress and Jeffrey A. Ruppert	
12			in his official capacity as treasurer	
13			Hillary for America and Elizabeth Jones	
14			in her official capacity as treasurer	
15			Wharton for Congress and George Wharton	
16			in his official capacity as treasurer	
17				
18	I.	INTRODUC	TION	
19		This matter w	as generated by a complaint filed with the Federal Electric	ction Commissi

This matter was generated by a complaint filed with the Federal Election Commission pursuant to 52 U.S.C. § 30109(a)(1) alleging that the Ohio Democratic Party ("ODP") was required by the Federal Election Campaign Act of 1971, as amended (the "Act"), to include appropriate disclaimers on a brochure it produced and distributed in October 2016, featuring the photographs and names of five federal candidates endorsing numerous state and local candidates in the November election, and on three sample ballots displayed on its website, for download and further distribution by viewers, listing various slates of Democratic federal, state, and local candidates on the November 8, 2016 ballot. ²
In addition, the Complaint alleges that the brochure is a coordinated communication between

ODP and each of the five federal candidates named therein, and that some portion of the costs

While Fran Alberty is Ohio Democratic Party's current treasurer, Zach West was its treasurer at the time of the events. See Ohio Democratic Party Amended Statement of Organization (Nov. 17, 2018). Similarly, while Elizabeth Jones is the current treasurer of Hillary for America, Jose Villareal was its treasurer at the time of the events. See Hillary for America Amended Statement of Organization (May 29, 2018). See also Statement of Policy Regarding Treasurers Subject to Enforcement Proceedings, 70 Fed. Reg. 3 (January 3, 2005).

Compl. (Oct. 18, 2016).

MUR 7154 (Ohio Democratic Party, et al.) Factual and Legal Analysis Page 2 of 15

- associated with the mailing should be attributed as an in-kind contribution to each of those
- 2 candidates.³ ODP, which is registered with the Commission as a state party committee,⁴
- 3 claims that it was in compliance with disclaimer requirements and all the respondents deny
- 4 that the brochure was coordinated.⁵
- 5 Based on the allegations of the complaint, the response, and other available
- information, there is no reason to believe that ODP violated 52 U.S.C. § 30120 with respect to
- 7 the brochure and sample ballots, and no reason to believe ODP violated 52 U.S.C.
- 8 § 30116(a)(2)(A) or that the candidate committee Respondents violated 52 U.S.C.§ 30116(f)
- 9 with respect to alleged coordination.

10 II. FACTUAL AND LEGAL ANALYSIS

A. The Brochure Did Not Require a Federally Compliant Disclaimer

- The two-page ODP brochure, which the Complainant alleges she received in the mail,
- includes the names and photographs of five federal candidates on the general election ballot in
- November 2016 Hillary Clinton, Ted Strickland, Joyce Beatty, Ed Albertson, and Scott
- Wharton above the words "Join us in endorsing your state and local Democratic candidates."

Id.

See Ohio Democratic Party Amended Statement of Organization (Nov. 17, 2018).

ODP Resp. at 2-4 (Dec. 12, 2016); Albertson for Congress Resp. at 1-2 (Nov. 9, 2016); Strickland for Senate Resp. at 2-3 (Dec. 12, 2016); Hillary for America Resp. at 2-3 (Dec. 14, 2016); Beatty for Congress Resp. at 2 (Dec. 13, 2016); Wharton for Congress Resp. at 1 (Jan. 10, 2018). On December 28, 2016, Wharton for Congress filed a termination report. See FEC Form 3, Wharton for Congress, (Dec. 28, 2016). On January 5, 2017, the Reports Analysis Division accepted the termination. See Letter from Chris Jones, Campaign Finance Analyst, FEC, to George R. Wharton, Treasurer, Wharton for Congress (Jan. 5, 2017).

See Compl. Ex. A. The brochure does not identify the offices sought by the federal candidates, which are, respectively, President, U.S. Senate in Ohio, and U.S. House in Ohio's 3rd, 12th and 15th Congressional Districts.

MUR 7154 (Ohio Democratic Party, et al.) Factual and Legal Analysis Page 3 of 15

- Below those words are the names of and offices sought by 31 state and local candidates on the
- 2 November ballot. The bottom of the first page contains the names and photographs of candidates
- for prosecuting attorney and recorder, with the words: "Standing up for Franklin County." The
- 4 second page of the brochure contains the names and photographs of two candidates for the Ohio
- 5 Supreme Court. One of the accompanying captions states "Ohio Democrats are Stronger
- 6 Together. Ohio needs experienced and fair judges." Another is "Don't Think Twice Vote
- 7 O'Donnell and Rice for Ohio Supreme Court." The brochure also exhorts the reader to vote for
- 8 specific local "Issues," apparently ballot measures, and contains the words "Vote early or on
- 9 ELECTION DAY NOV. 8. Ohio Together.com." The second page also urges readers to: "Vote
- early or on Election Day Nov. 8." The brochure does not contain a federally compliant
- disclaimer, although the return address of the brochure contains ODP's name and street address,
- and the bulk postage stamp indicates that ODP paid the postage.⁷

The Complaint asserts that the brochure required a disclaimer because it is a "public

14 communication" distributed by a political committee. 8 ODP contends that the brochure was

exempt from federal disclaimer laws because it did not constitute "Federal election activity"

16 under the Act.9

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The brochure also states: "Disclaimer: ODP will never charge you for text alerts, but your carrier's msg and data rates may apply." *Id.*

⁸ Compl. at 2-3.

ODP Resp. at 1-3. The candidate committees, Strickland for Senate, Hillary for America, Albertson for Congress, Beatty for Congress, and Wharton for Congress, each deny paying for the brochure or authorizing it; on that basis, they each assert that they are not responsible for any potential disclaimer violations. Strickland for Senate Resp. at 1-2; Hillary for America Resp. at 1-2; Beatty for Congress Resp. at 2-4; Albertson for Congress Resp. at 1-2; Wharton for Congress Resp. at 1.

MUR 7154 (Ohio Democratic Party, et al.) Factual and Legal Analysis Page 4 of 15

- The Act and Commission regulations require disclaimers on all "public
- 2 communications," including mass mailings, by any person that expressly advocates the election
- 3 or defeat of a federal candidate or that solicits any contribution; all "electioneering
- 4 communications" by any person; and all "public communications" by a "political committee." ¹⁰
- 5 A disclaimer on a printed communication, such as a mailer, must be in a box and state whether
- the communication is authorized by a candidate, candidate's committee, or its agents, and
- 7 identify the person who paid for the communication. 11 ODP's brochure did not contain such a
- 8 disclaimer.

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ODP's brochure qualifies as a "public communication" because it is a "mass mailing," a fact not disputed by ODP.¹² Thus, the brochure would require a disclaimer if ODP is a "political committee" within the meaning of the disclaimer provision.¹³ The Commission has determined, however, that "the disclaimer provisions of the Act do not apply to purely non-Federal activity conducted by a state or local political party committee's non-Federal component and paid for with non-Federal funds" because such activity by a party committee is not activity of a "political

⁵² U.S.C. § 30120(a); 11 C.F.R. § 110.11(a). The term "public communication" includes mass mailings, which in turn are defined as mailings "by United States mail... of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period." 52 U.S.C. § 30101(22), (23); 11 C.F.R. §§ 100.26, 100.27.

⁵² U.S.C. § 30120(a)(3); 11 C.F.R. § 110.11(b)(3). A disclaimer on a printed communication must be contained in a printed box, be of sufficient type size to be readable, and be printed with a reasonable degree of color contrast between the background and the disclaimer statement. 52 U.S.C. § 30120(c)(1), (2), (3); 11 C.F.R. § 110.11(c)(2)(i), (ii), (iii).

See ODP Resp. at 2-5. The brochure, as printed material, is not within the definition of "electioneering communication" and, therefore, not within the electioneering communication disclaimer provision. See 52 U.S.C. § 30104(f)(3) and 11 C.F.R. § 100.29 (defining "electioneering communication" as broadcast, cable, or satellite communication meeting certain specified requirements).

The brochure would also require a disclaimer if it solicits any contribution, though the brochure cannot be fairly read as soliciting any contribution. See 11 C.F.R. § 110.11(a)(3).

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MUR 7154 (Ohio Democratic Party, et al.) Factual and Legal Analysis Page 5 of 15

- 1 committee" within the scope of the disclaimer provision. ¹⁴ A state party committee
- 2 communication that is "wholly in connection with a non-federal election" is nevertheless subject
- 3 to the disclaimer rules if it constitutes "federal election activity" ("FEA") or "other Federal-
- 4 related activity requiring Federal funding." ODP asserts that the brochure was "properly paid
- for solely with non-federal funds," 16 which appears to be corroborated by ODP's state and
- 6 federal disclosure reports.

1. The Brochure is Not Federal Election Activity because it does Not Promote, Support, Attack, or Oppose a Federal Candidate

One way ODP's communication would be considered FEA, and thus require a disclaimer as a public communication of a political committee, is if it refers to a clearly identified candidate for federal office and promotes, supports, attacks, or opposes a candidate for that office ("PASO").¹⁷ The Commission has stated that a public communication clearly identifying a federal candidate who is endorsing a state or local candidate does not necessarily PASO the endorsing federal candidate. In Advisory Opinion 2003-25 (Weinzapfel), the Commission

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Statement of Reasons, Comm'rs. Toner, Lenhard, Mason, Walther, Weintraub & von Spakovsky at 5, MUR 5600 (Michigan Democratic State Central Committee) (agreeing with the OGC's coordination and federal election activity analyses, but disagreeing with the recommendation to find disclaimer violation for state party committee's non-federal component's non-federal disbursements for mass mailing in which federal candidate endorsed state candidate) ("MUR 5600 SOR"); see also 11 C.F.R. § 102.5(a)(i), (ii) (requiring state party committees that finance political activity in connection with both federal and non-federal elections, and that qualify as political committees, to establish either a dedicated federal account that is treated as a "separate Federal political committee," which must comply with the requirements of the Act, or establish a political committee that receives only contributions subject to the prohibitions and limitations of the Act, for use in both federal and non-federal elections).

MUR 5600 SOR at 3-4; see also 52 U.S.C. § 30101(20) (defining FEA); 11 C.F.R. § 100.24 (same); cf. 11 C.F.R. § 300.32 (describing that activity for which state party committee must use federal funds and that non-federal activity for which state party committee may use federal or non-federal funds).

ODP Resp. at 2.

¹⁷ See 52 U.S.C. § 30101(20)(A)(iii); 11 C.F.R. § 100.24(b)(3).

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- concluded that a television advertisement, in which an incumbent candidate for U.S. Senate, who
- 2 was identified as Senator in written words on screen, appeared and spoke his endorsement of a
- 3 local candidate, did not PASO that federal candidate. The Commission stated, "[u]nder the plain
- 4 language of [the Act], the mere identification of an individual who is a Federal candidate does
- 5 not automatically promote, support, attack, or oppose that candidate." 18 Similarly, in the
- 6 enforcement context, in MUR 5600 (Michigan Democratic State Central Committee), the
- 7 Commission approved OGC's recommendations that a state party mailer was not required to be
- 8 paid with federal funds because it did not PASO a federal candidate merely by containing a
- 9 quotation from U.S. Rep. Dingell, who at the time was a Democratic candidate for re-election in
- the 15th Congressional District in Michigan, endorsing a state candidate and a photo of Dingell
- and the state candidate together. 19

We conclude that the five federal candidates were included in the ODP brochure in connection with an endorsement and the brochure did not PASO any federal candidate. The five federal candidates are identified in the brochure by photograph and name, but the brochure

includes no information about these candidates other than their identification. It does not

Advisory Op. 2003-25 at 3-5. In subsequent advisory opinions, the Commission concluded that public communications did not PASO a federal candidate when the communication does not add any additional statement that could be construed as support or promotion of the federal candidate, and the communication emphasizes state or local candidates. See, e.g., Advisory Op. 2009-26 (Coulson) (concluding, in respect to the identification of a candidate by name and picture on a mass mailing, that "the mere identification of an individual who is a Federal candidate does not, in itself, promote, support, attack, or oppose that candidate"); Advisory Op. 2007-21 (Holt) (considering federal candidate's name and title "Honorary Chairman" contained on state campaign's letterhead and other public communications). In one opinion, the Commission reached this decision in the context of a communication that included an exhortation to vote. Advisory Op. 2007-34 (Jackson, Jr.) at 2 (advertisement contained the words "Vote February 5th," the date of the primary election of both the endorsing federal candidate and the state candidate in question).

See MUR 5600 First Gen. Counsel's Rpt. at 3-5; Certification, MUR 5600 (Apr. 18, 2006); MUR 5600 SOR at 1-2; see also MURs 5387/5446 (Welch for Wisconsin) (radio advertisement that contained endorsement by federal candidate without mentioning federal candidacy did not PASO the federal candidate).

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- 1 mention their federal offices sought and neither praises nor criticizes the federal candidates;
- 2 indeed, the brochure says nothing about the federal candidates at all, other than the presentation
- 3 of their names and images. Their photographs are of approximately equal size to the
- 4 photographs of the state candidates contained on the same page, and are smaller than the two
- 5 photographs of the state judicial candidates on the second page of the brochure. The names of 31
- other state and local candidates and offices sought appear along with exhortations to vote on
- 7 local issues, and, while the qualifications of the photographed state candidates are listed, the
- 8 brochure makes no representations about the qualifications of the federal candidates. The
- 9 general exhortation to vote, "Vote early or on Election Day Nov. 8," appears below the list of 31
- state and local candidates, not directly below the photographs and names of the federal
- candidates. Taken as a whole, the brochure does not contain any statements that could be
- construed as support or promotion of any of the referenced federal candidates. Just as the
- 13 advertisements discussed above featuring a federal candidate's endorsement of a local candidate
- did not PASO the federal candidate, the ODP brochure, featuring the photographs and names of
- the federal candidates with the statement "Join us in endorsing your state and local Democratic".
- candidates," does not PASO the endorsing federal candidates.
 - 2. The Brochure is Not Federal Election Activity because it is Not GOTV
- The brochure would also be considered FEA, and thus require a disclaimer as a public
- 19 communication of a political committee, if it constitutes get-out-the-vote activity ("GOTV"). 20
- 20 GOTV generally includes any activity that encourages or urges potential voters to vote, including
- 21 informing voters of polling locations or hours and providing transportation to the polls.²¹ The

See 52 U.S.C. § 30101(20)(A)(ii); 11 C.F.R. § 100.24(b)(2)(iii).

²¹ 11 C.F.R. § 100.24(a)(3)(i).

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- 1 Commission regulations state that "[a]ctivity is not get-out-the-vote activity solely because it
- 2 includes a brief exhortation to vote, so long as the exhortation is incidental to a communication,
- activity, or event."²² Examples of communications that are not GOTV include: (1) "[a] mailer
- 4 praises the public service record of mayoral candidate X and/or discusses his campaign platform.
- 5 The mailer concludes by reminding recipients, 'Vote for X on November 4th,'" and (2) "[a]
- 6 phone call for a State party fundraiser [that] gives listeners information about the event, solicits
- donations, and concludes by reminding listeners, 'Don't forget to vote on November 4th.'"²³
- We conclude that the brochure is not GOTV because it contains only a brief exhortation
- 9 to vote, and the exhortation is incidental to the communication.²⁴ The statements in ODP's
- brochure are similar to the statements the Commission regulations specify are not GOTV. For
- instance, on the first page of the brochure: "Vote early or on ELECTION DAY NOV. 8" is
- materially similar to the regulatory example cited above which reminds the reader to vote on a
- specific day. 25 The statement on the second page of the brochure: "Don't Think Twice Vote
- 14 O'Donnell and Rice for Ohio Supreme Court" is materially similar to the other example urging
- the reader to vote for a specific candidate. Moreover, the majority of the space in the brochure
- is dedicated to promoting state and local candidates, and discussing their qualifications,
- 17 platforms, and local issues, and the statements urging the readers to vote constitute a single

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²² 11 C.F.R. § 100.24(a)(3)(ii); see also Definition of Federal Election Activity, 75 Fed. Reg. 55,257, 55,263-65 (Sept. 10, 2010) ("FEA E&J").

²³ 11 C.F.R. § 100.24(a)(3)(ii)(A)-(B).

See FEA E&J at 55,263-65; 11 C.F.R. § 100.24(a)(3)(ii).

²⁵ See 11 C.F.R. § 100.24(a)(3)(ii)(B).

²⁶ See 11 C.F.R. § 100.24(a)(3)(ii)(A).

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- phrase on each page and occupy minimal space, thus supporting the conclusion that they are
- 2 incidental.²⁷
- 3. The Brochure Does Not Appear to Otherwise Constitute Federal-Related
 Activity Requiring Federal Funding so as to Require a Disclaimer

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The ODP brochure neither PASOs a federal candidate nor is GOTV and does not

- 7 otherwise constitute FEA.²⁸ The brochure also does not appear to fall within the express
- 8 advocacy scope provision of the disclaimer rules.²⁹
 - Moreover, ODP's brochure does not appear to be a slate card subject to the disclaimer rules at 110.11(e)³⁰ or any other provision in the scope of the disclaimer rules other than for

²⁷ See FEA E&J at 55,264-65; see also 11 C.F.R. § 100.24(a)(3)(ii)(A), (B).

FEA also includes voter registration activity 120 days before a federal election; voter identification; generic campaign activity in connection with an election in which a candidate for federal office appears; and services provided during any month an employee of a state party committee spends more than 25 percent of that individual's time in connection with a federal election. 52 U.S.C. § 30101(20)(A)(i), (ii), (iv); 11 C.F.R. § 100.24(b)(1), (2)(i) and (ii), (4). ODP asserts that the brochure constitutes none of these aspects of FEA, and we agree: ODP's brochure is not voter registration activity because it does not "assist, encourage, or urge potential voters to register to vote;" does not constitute generic campaign activity because it promotes candidates for non-federal office; does not meet the definition of voter identification because it does not seek to acquire information about potential voters or obtain voter lists; and is a communication, not a service provided by a state party employee. See ODP Resp. at 2-3; FEA E&J at 55,260; 52 U.S.C. § 30101(21); 11 C.F.R. §§ 100.24(b)(1), 100.24(b)(2)(i), 100.24(b)(4), 100.25.

See 11 C.F.R. § 110.11(a)(2); 11 C.F.R. § 100.22 (a communication "expressly advocates" the election or defeat of a clearly identified candidate when, among other things, it contains campaign slogans or individual words that "in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates" or when, taken as a whole and with limited reference to external events, it "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates"). We conclude that because the ODP brochure does not meet the PASO standard, see discussion supra Section II.A.1, it does not meet the more restrictive express advocacy standard. See 52 U.S.C. § 30101(20)(A)(iii) and 11 C.F.R. § 100.24(b)(3) (providing that a communication may PASO a candidate whether or not the communication expressly advocates the election or defeat of a federal candidate); see also Coordinated Communications, 74 Fed. Reg. 53,893, 53,900 (Oct. 21, 2009) (proposing, in response to court decision requiring more inclusive coordination content standard than express advocacy, PASO content standard, on basis that "express advocacy is a subset of PASO") (not promulgated in final rules).

Section 110.11(e) specifies that political party committees must comply with applicable disclaimer requirements for certain "exempt activity" communications, including slate cards, though need not include candidate authorization statements in those disclaimers. 11 C.F.R. § 110.11(e); see also 11 C.F.R. §§ 100.80, 100.140 (exempting from definitions of "contribution" and "expenditure," respectively, a slate card, sample ballot, or other printed listing of three or more candidates for public office for which an election is held in the state in which the political party committee is organized, though it may or may not be FEA); Prohibited and Excessive Contributions: Non-federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,068-069 (July 29, 2002). The Statement of Reasons in

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- public communications by a political committee. Finally, as explained further below, ODP's
- 2 brochure does not appear to be coordinated with any federal candidate so as to require federal
- 3 funds for any resulting contribution. In sum, ODP's brochure appears to be purely non-federal
- 4 activity by a state party committee and, appears to be paid for from ODP's non-federal
- 5 account, 31 thus the communication appears to be exempt from the Act's disclaimer requirements,
- 6 consistent with the Commission's conclusions in MUR 5600.
- 7 Therefore, there is no reason to believe that the Ohio Democratic Party and Fran Alberty
- 8 in her official capacity as treasurer violated 52 U.S.C. § 30120 with respect to using the
- 9 appropriate disclaimers on the brochure.

B. The Sample Ballots Contained the Required Disclaimer

- The three sample ballots attached to the Complaint, each one-sided, include the heading:
- "Ohio Democrats are Stronger Together" and "Ohio Democratic Party Official Sample Ballot." 32

MUR 5600, which considered a communication listing less than three candidates, did not address whether a political party committee disbursing non-federal funds for a slate card or similar mailing would be required to include a disclaimer on such a public communication. Nonetheless, ODP's brochure does not appear to fall within the definition at 11 C.F.R. § 100.140. See Factual and Legal Analysis at 3, MUR 6088 (Haverford Township Democratic Committee) (materials subject to the slate card exemption may only include basic candidate voting information, and publications that go beyond the informational limitations and include language criticizing opponents, additional biographical information, descriptions of candidates' positions on issues, or party philosophy do not qualify for the exemption). ODP's brochure criticizes local judicial candidates' opponents; and includes state and local candidate biographical information. Compl. Ex.A.

ODP's reports filed with the Ohio Secretary of State disclose disbursements for "mailing" during the time the brochure was distributed, October 2016, and its reports filed with the Commission do not disclose any such payments during that time. See ODP 2016 Post General Rpt (Dec. 16, 2016) https://www6.sos.state.oh.us/ords/f?p=CFDISCLOSURE:39:::NO:RP:P39">ENTITY ID,P39 LISTTYPE:5001,sim ple; see also Third Amended Post-General 2016 Rpt. (Sept. 25, 2017), Amended Pre-General Rpt. (June 6, 2017). https://www.fec.gov/data/committee/C00016899/?cycle=2016&tab=filings. The Committee's reporting at both the state and federal level is consistent with its assertion that the brochure was paid for "exclusively with non-federal funds." See OPD Resp. at 3.

See Compl. Exs. B, C, D.

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- 1 The first sample ballot contains photographs of Hillary Clinton, U.S. Representative Marcy
- 2 Kaptur, and Barack Obama; the second, photographs of Clinton and Tim Kaine; and the third, a
- 3 photograph of U.S. Representative Joyce Beatty.³³ The ballots list the names of and offices
- 4 sought by federal, state, and local candidates.³⁴ The Complaint asserts that the sample ballots are
- 5 publicly available on ODP's website, which contains a disclaimer; the Complaint alleges,
- 6 however, that "viewers are encouraged to download the sample ballot, post it on Facebook or
- 7 tweet it" and when so printed, posted to Facebook, or tweeted, the sample ballots contain no
- 8 disclaimer.³⁵ The Complaint further asserts that sample ballots were "issued" by ODP. While
- 9 the Complaint asserts that it attached "true and accurate copies of the several sample ballots," it
- does not clearly set forth how they were obtained, e.g., whether they were printed from ODP's
- website, or if ODP "issued" them in printed form.³⁶
- ODP asserts that, as internet communications, the sample ballots appearing on its website
- did not require disclaimers, and that its website contained the appropriate disclaimer.³⁷ ODP
- 14 further claims that it "only encouraged individuals to use these documents for their personal use,
- or to place them on their personal social networking websites (specifically, Facebook or

³³ *Id*.

³⁴ *Id*.

Compl. at 2.

³⁶ *Id*

³⁷ ODP Resp. at 1, 6, Attach. 5.

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1 Twitter)."³⁸ ODP further asserts that it created and distributed separate versions of each sample

2 ballot, each containing the appropriate disclaimer. 39

3 Sample ballots authorized by a political party committee must comply with the Act's

4 disclaimer requirements, but need not state whether the communication is authorized by a

candidate or authorized committee. 40 The Commission's regulations provide that a required

6 "disclaimer need not appear on the front or cover page of the communication as long as it

appears within the communication."41 All websites of political committees available to the

general public must include a disclaimer. 42

The one-sided sample ballots attached to the Complainant contained no disclaimer; the two-sided copies of the sample ballots provided by ODP, which it asserts were printed and distributed, contain a disclaimer, on the second side, stating that they were paid for by ODP. ⁴³

Therefore, to the extent that the Complaint is premised on sample ballots printed and distributed by ODP, it appears that the printed and distributed sample ballots contained the appropriate disclaimer. Further, to the extent that the Complaint is premised on sample ballots ODP posted

³⁸ *Id.* at 6.

¹d. at 6, Attach. 2, 3, 4. ODP attaches to its response copies of two-sided printed sample ballots, with the second side of the ballot including a disclaimer in a printed box stating: "Paid for by the Ohio Democratic Party," or "Paid for by the Ohio Democratic Party, David Pepper, Chairman." 1d. at 6, Attach. 2, 3, 4.

⁴⁰ 11 C.F.R. §§ 110.11(e), 100.140.

¹¹ C.F.R. § 110.11(c)(2)(iv) (also noting exception for communications such as billboards, that contain only a front face, which is not applicable here).

⁴² 11 C.F.R. § 110.11(a)(1); see also Advisory Op. 1995-09 (NewtWatch) at 2.

See ODP Resp. Attach. 2, 3, 4.

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- on its own website, images on websites do not have separate disclaimer requirements, and the
- 2 ODP website, generally, contained the appropriate disclaimer.⁴⁴
- Therefore, there is no reason to believe that the Ohio Democratic Party and Fran Alberty
- in her official capacity as treasurer violated 52 U.S.C. § 30120 with respect to using the
- 5 appropriate disclaimers the sample ballots.

C. The Brochure is not a Coordinated Communication

that the safe harbor provision for endorsing federal candidates applies.⁴⁶

The Complaint alleges that the brochure purports to be a communication from the five named federal candidates and paid for by ODP, and thus appears to be a coordinated communication between ODP and each federal candidate; as such, the Complaint alleges that a portion of the costs associated with the brochure appears to be an in-kind contribution from ODP to each federal candidate.⁴⁵ Respondents deny coordinating the brochure, and the responding federal candidate committees each deny that they authorized the brochure and assert

ODP Resp. Attach. 5. As for third parties' use of ODP's sample ballots on the internet, the available record does not indicate that ODP placed the ballots on another person's website for a fee and, therefore, such ballots are not "public communications" by ODP within the scope of the disclaimer requirement. See 11 C.F.R. §§ 100.26 (defining "public communication"), 110.11(a)(1); see also Advisory Op. 2011-14 (Utah Bankers Association) (concluding that further disclaimers to email solicitations and website are not necessary, even if asked to be forwarded). Further, the Commission has concluded that internet pages do not constitute "printed communications;" therefore, the additional disclaimer requirements for printed disclaimers, including the "printed box" requirement, do not apply to campaign websites. See Statement of Reasons, Comm'rs. Weintraub, Walther, Lenhard, Mason, Toner and von Spakovsky at 4, MUR 5526 (Graf for Congress); see also Factual and Legal Analysis at 2-3, MUR 6591 (Friends of Tom Stilson); Factual and Legal Analysis at 6-9, MUR 5887 (Republican Main Street Partnership).

⁴⁵ Compl. at 3.

ODP Resp. at 4; Strickland for Senate Resp. at 1-3; Hillary for America Resp. at 1-3; Beatty for Congress Resp. at 2-4; Albertson for Congress Resp. at 1-2; Wharton for Congress Resp. at 1. One candidate committee, Albertson for Congress, acknowledges it provided Albertson's photograph to ODP and that it was used in the brochure. Albertson for Congress Resp., Edward G. Albertson Aff. ¶¶ 4, 7 (Nov. 5, 2016); Esther Boykin, Treasurer Aff. ¶ 7 (Nov. 4, 2016); Albertson for Congress Resp. Ex. A. This use could raise an issue of ODP's republication of Albertson's campaign material, thus constituting a contribution to Albertson. See 11 C.F.R. § 109.23. But the Albertson photograph is one small photograph in a brochure of many photographs and the brochure primarily focuses on state and local candidates and issues. Thus, the republished photograph appears to be of

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Contributions from a state party committee to a candidate committee are limited to a total 1 of \$5,000 per election, and candidates and political committees are prohibited from knowingly 2 accepting contributions in excess of the Act's limits; party committees may make "party 3 coordinated communications" subject to a higher limit. ⁴⁷ Under the Act, expenditures that are 4 coordinated with a candidate are treated as contributions to the candidate. 48 The Commission 5 has promulgated certain exceptions to the definitions of "party coordinated communication" and 6 "coordinated communication," including that a public communication in which a federal 7 8 candidate endorses another candidate for federal or non-federal office is not a coordinated communication as to the endorsing federal candidate unless the communication PASOs the 9 endorsing candidate or another candidate who seeks election to the same office as the endorsing 10 candidate. 49 In creating a safe harbor for endorsements, the Commission stated that the 11 coordinated communications regulation identifies communications made for the purpose of 12 influencing a federal election, whereas endorsements "are not made for the purpose of 13 influencing the endorsing . . . candidate's own election."50 It also concluded that when the safe 14

de minimis value. See Factual and Legal Analysis at 7-8, MUR 6840 (All Citizens for Mississippi) (dismissing a republication allegation due to its de minimis value).

⁵² U.S.C. § 30116(a)(2)(A), (f). The Act grants state party committees authority to also support their general election candidates with coordinated expenditures subject to certain limits, including through assignment by a national party committee. See 52 U.S.C. § 30116(d); 11 C.F.R. § 109.32. In 2016, the coordinated limit to support House candidates in states with more than one congressional district was \$48,100; the coordinated limit to support Ohio Senate candidates was \$863,800; and the limit for presidential candidates was \$23,821,100.

See https://www.fec.gov/resources/cms-content/documents/fedreg_notice_2016-01.pdf.

⁴⁸ 52 U.S.C. § 30116(a)(7)(B).

⁴⁹ 11 C.F.R. §§ 109.37(a)(3), 109.21(g)(1).

⁵⁰ Coordinated Communications. 71 Fed. Reg. 33,190, 33,202 (June 8, 2006).

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- harbor applies, the endorsing candidate may be involved in the development, content, timing,
- 2 frequency, means or mode of the communication.⁵¹
- The endorsement safe harbor appears to apply here because, as discussed above, the ODP
- brochure does not appear to PASO any of the five federal candidates pictured and named in the
- 5 brochure or any other candidate running for the offices each sought.⁵² Accordingly, the brochure
- 6 appears to be exempt from the definition of "coordinated communication."
- 7 Therefore, there is no reason to believe that the Ohio Democratic Party and Fran Alberty
- 8 in her official capacity as treasurer violated 52 U.S.C. § 30116(a)(2) by making a coordinated
- 9 expenditure for the brochure, or that Albertson for Congress and Esther Boykin in her official
- capacity as treasurer, Strickland for Senate and Michael J. Johrendt in his official capacity as
- treasurer, Beatty for Congress and Jeffrey A. Ruppert in his official capacity as treasurer, Hillary
- 12 for America and Elizabeth Jones in her official capacity as treasurer, or Wharton for Congress
- and George Wharton in his official capacity as treasurer violated 52 U.S.C. § 30116(f) by
- 14 accepting an excessive contribution.

⁵¹ *Id*.

See 11 C.F.R. §§ 109.37(a)(3), 109.21(g); discussion at Section II.A.1. supra;
Factual & Legal Analysis at 4-9, MUR 7022 (Bernie 2016) (finding no reason to believe the federal candidate committee violated the disclaimer provisions by failing to include the approval/authorization or "paid for by" statement in the broadcast advertisement that satisfied the safe harbor provision for coordinated communications containing endorsements by federal candidates).